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IN THE

Supreme Court of The United States

October Term, 1942.

No. 860

ASSOCIATION OF AMERICAN RAILROADS
and
THE LONG ISLAND RAIL ROAD COMPANY,
Cross-Petitioners,

vs.

SPERRY PRODUCTS, INC.,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

	PAGE
Cross-Petition for Writ of Certiorari	1
Summary and Short Statement of Matter Involved	2
Rulings of the Courts Below	5
Jurisdiction	6
Statutes Involved	7
The Questions Presented	7
Reasons Relied on for the Allowance of the Writ	8
Brief in Support of Cross-Petition	10
The Opinions of the Courts Below	10
Jurisdiction	11
Statement of the Case	11
Specification of Errors	11
Summary of the Argument	12
Point A. Attributing "inhabitancy" to the Association for the purpose of jurisdiction under Sec. 48 of the Judicial Code is contrary both to the purpose of that Act and to the long settled doctrine about status of groups for federal jurisdiction	12
Point B. Permitting the suit to proceed against the admittedly innocent Long Island Rail Road is contrary to the stated purpose of the complaint	12
Argument	12
Point A. Inhabitancy of the Association	12
Jurisdiction and Venue Not Extended by the *Coronado* Case and the Rules of Civil Procedure	14
Puerto Rico *v.* Russell, 288 U. S. 476 at 480, 53 S. Ct. 447, 77 L. Ed. 903 at 907	14
Sutherland *et al. v.* The United States, 74 F. (2d) 89	15
Diversity Cases Are Guiding Precedents	16
Point B. The cause against The Long Island	17
Conclusion	19
Appendix	19
Sec. 48 of the Judicial Code (U. S. C. A., Title 28, Section 109)	19

Table of Cases.

PAGE

Chapman *v.* Barney, 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800 ..... 12, 14

Great Southern Fire Proof Hotel Co. *v.* Jones, 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 842 ..... 12, 14

Lafayette *v.* French *et al.*, 18 How. 404 at 405, 15 L. Ed. 451 at 452 12

Levering *et al. v.* Morrin, 61 F. (2d) 115 14

Puerto Rico *v.* Russell, 288 U. S. 476, 53 S. Ct. 447, 77 L. Ed. 903 ..... 8, 14

Re Keasbey & Mattison, 160 U. S. 221 at 229, 16 S. Ct. 273 at 275, 40 L. Ed. 402 at 405 16

Sperry Products, Inc., *v.* Association of American Railroads, District Court, Judge Conger, 44 Fed. Supp. 660; Circuit Court of Appeals, Second Circuit, Judge L. Hand, 132 F. (2d) 408 10

Stonite Products Co. *v.* Lloyd Co., 315 U. S. 561, 86 L. Ed. 1026 13

Sutherland *et al. v. The United States*, 74 F. (2d) 89 ..... 8, 15

Thomas *v.* Ohio State University Trustees, 195 U. S. 207, 25 S. Ct. 24, 49 L. Ed. 160 ..... 12, 14

United Mine Workers of America *v.* Coronado Coal Co., 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975 ..... 5, 14

Rules Cited.

Rule 17(b) R. C. P. 14

Statutes Cited.

Sec. 48 of the Judicial Code, U. S. C. A., Title 28, Section 109 ..... 4, 5, 7

Sec. 240(a) of the Judicial Code as Amended Feb. 13, 1925, c. 229 (43 Stat. 938) (28 U. S. C. A. 347) 6, 11

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The cross-respondent, Sperry Products, Inc., who was the plaintiff-appellant below, has filed a petition for writ of certiorari in *Sperry Products, Inc.*, v. *Association of American Railroads et al.*, No. 859, seeking a review of a portion of judgment entered December 31, 1942, by the Circuit Court of Appeals for the Second Circuit therein.

Your cross-petitioners, Association of American Railroads and The Long Island Rail Road Company, pray that a cross-writ of certiorari be directed to the Circuit Court of Appeals for the Second Circuit to review that portion of the judgment entered December 31, 1942, reversing the judgment of the District Court as to the said Association and The Long Island Rail Road Company.

The certified transcript of the record filed in No. 859 includes those portions of the record upon which this cross-petition is based.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

1. This is a patent infringement suit (R. 3) filed July 9, 1941, by the cross-respondent, Sperry Products, Inc., in the *Southern District of New York* v. *the Association of American Railroads*, six member railroads, and F. E. Williamson, a Director of the Association of American Railroads and the President of The New York Central Railroad Company, but later limited to three defendants, the Association of American Railroads, The Long Island Rail Road Company, and Williamson, because it transpired that none of the other five member roads was an inhabitant of the Southern District of New York, and the District Court dismissed the complaint as to them (R. 50 and 52), and the plaintiff did not press an appeal from that part of the judgment (R. 59).

2. It was alleged that the six member railroads and Williamson, as parties, fairly insure the adequate representation of the joint and common interests of the defendant Association and of all its members as a class (R. 5) for the purpose of a class action under Rule 23 R. C. P.

3. Shortly after filing the complaint, the cross-respondent wrote (R. 35, 39, 40, and 41) each of the defendant rail-

roads (except The New York Central) to explain that it was made a defendant due to a purely legal technicality arising from the necessity of filing suit against the individual members in order to sue the Association, that it was not charged with any act of infringement individually, that the infringing act complained about was committed by the Association and The New York Central, that the suit would put the defendant road to no trouble or expense, and that, since it had never used the alleged infringing device, it would not be liable for damages for such use.

4. The Long Island Rail Road Company is the only member of the Association that is an inhabitant of the Southern District of New York, in which this suit was brought.

5. The Association of American Railroads is an unincorporated, voluntary association of about two hundred railroad companies, some of whom are citizens and inhabitants of Canada and more than two-thirds of the states of the United States. (Complaint, R. 3, paragraph 3, and R. 81.)

6. The purpose of the Association of American Railroads is to deal with matters of common concern to its members in the whole field of railroading. ("The Association of American Railroads, Its Organization and Activities," R. 81.)

7. The headquarters of the Association and the offices of the President, the Secretary-Treasurer, and the Vice-Presidents in charge of its departments, are in Washington, D. C. (R. 83). It has divisions with headquarters in New York and Chicago (R. 84-100) and offices scattered widely from Coast to Coast. (Map, R. 92A.)

8. The Engineering Division has headquarters in Chicago (R. 86), and among the projects of that division is "* * * the cause and detection of hidden defects in rails * * *" (R. 87) and other things relating to rails in the track.

9. Through this Engineering Division and under the direction of the Engineer of Tests of the Rail Committee, the Association developed apparatus for finding hidden flaws in rails in the track, sometimes called a "Transverse Fissure Detector Car" (R.32); and the use of this car, identified as the "Magnetic Detector Car X-201," is the basis of the charge of infringement (R. 35).

10. The allegations about infringement are not clear and specific (R. 5, paragraph 7), but there is neither allegation nor proof of an act of infringement within the Southern District of New York, where the suit was brought. The New York Central Railroad Company is the only member of the Association that is alleged to have infringed "individually" (R. 5, paragraph 7).

11. The complaint alleges the Association of American Railroads to be an "inhabitant" of the Southern District of New York (R. 3, paragraph 3), and Sperry tried to maintain the allegation on the theory that the Association of American Railroads is an "inhabitant" of any district in which a member (here, The Long Island Rail Road Company) is an inhabitant. (Opinion of the District Court, R. 44.)

12. The Association moved to dismiss (R. 9) the complaint on the ground, among others, that the District Court has no jurisdiction over the Association of American Railroads under the limitations of Sec. 48 of the Judicial Code (28 U. S. C. A. 109) because the Association is not an inhabitant of the Southern District of New York within the meaning and intent of the Statute and the complaint does not allege an act of infringement within the district.

13. The Long Island Rail Road Company moved to dismiss on the ground, among others, that the complaint fails to state a claim against that road upon which relief can be granted (R. 15).

14. Each of the other member defendants moved to dismiss (R. 10, 13, 16, and 19) on the grounds, among others,

that they are not inhabitants of the Southern District of New York.

15. Williamson moved to dismiss (R. 16) on the ground that the complaint does not state a cause of action against him individually, or otherwise, upon which relief can be granted.

RULINGS OF THE COURTS BELOW.

1. The District Court (in an Opinion by Judge Conger published in 44 F. Supp. 660) determined that, while under the *Coronado* case[1] the Association could be sued in its common name, there had been no extension of the jurisdictional limitations of Sec. 48 of the Judicial Code, and the allegation that the Association is an inhabitant of the Southern District of New York carries no weight and is meaningless (R. 45).

a. It held that the inhabitancy of the Association depended on the inhabitancy of all of its members (R. 46).

b. It decided that The New York Central, Boston and Maine Railroad, Delaware & Hudson Railroad Corporation, and The New York, Chicago and St. Louis Railroad Company are not inhabitants of the Southern District of New York (R. 48-50).

c. It found that the complaint is ambiguous as to The Long Island Rail Road Company (R. 50), and, in view of the letter from the plaintiff (R. 35), the complaint against The Long Island should be dismissed (R. 51).

d. It found that the defendant Williamson is not alleged to have infringed individually, and apparently is made a defendant in a representative capacity only (R. 50).

e. A final judgment (R. 52) dismissing the complaint for improper venue as to the Association and the member roads, named in the above paragraph b, and failure to state

[1] *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975.

a claim as to The Long Island and Williamson was entered February 13, 1942.

2. The Circuit Court of Appeals for the Second Circuit (Circuit Judges L. Hand, Chase, and Frank) reversed the judgment of the District Court as to the Association and The Long Island Rail Road Company and affirmed it as to Williamson (R. 64). In an opinion by Judge L. Hand (R. 59), published in 132 F. (2d) 408, it held that in construing Sec. 48 of the Judicial Code in its application to an unincorporated association the Court should attribute "inhabitancy" to the Association as though it were a single jural person and not an aggregate (R. 61 and 62);

a. And that, if a patentee chooses to sue an unincorporated association under the doctrine of the *Coronado* case, he must do so either at its principal place of business or at any of the regular and established places of its business where it may have infringed (R. 63);

b. But if the cross-respondent wishes to proceed against the Association in this action the issue should first be tried whether the Association's principal place of business is within the Southern District of New York (R. 64);

c. And it held that, if the plaintiff wishes to proceed against The Long Island Rail Road Company, the Railroad must answer (R. 64).

d. In a concurring opinion, Judge Frank said the Association should be suable in the Southern District of New York if that is one of its principal places of doing business (R. 65).

JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended February 13, 1925, c. 229 (43 Stat. 938 (28 USCA 347)). The judgment of the Circuit Court of Appeals was entered December 31, 1942. The cross-petition was filed March ...., 1943.

STATUTES INVOLVED.

Sec. 48 of the Judicial Code (U. S. C. A., title 28, sec. 109). (Printed in the Appendix at p. 19.)

THE QUESTIONS PRESENTED.

1. Whether an unincorporated, voluntary association of about two hundred railroad companies, among whom are citizens and inhabitants of Canada and more than two-thirds of the states of the United States, is to be attributed "inhabitancy" under Sec. 48 of the Judicial Code as though it were a single jural person and not an aggregate. And, if so, whether the District Court has jurisdiction over the Association in the district where its principal place of business is located.

2. Whether the unincorporated Association of American Railroads is to be considered an "inhabitant" within the meaning of Sec. 48 of the Judicial Code in the district where its principal place of business is located without regard to the citizenship and inhabitance of its more than two hundred members, only one of which is an inhabitant of the district where the suit was brought, and that one is not alleged to have infringed individually.

3. Whether the ambiguous complaint (R. 5, paragraph 7), which merely names The Long Island along with "the other defendants as representatives" of the defendant Association and its members, states a cause of action against The Long Island upon which relief can be granted in view of the letter from the plaintiff (R. 35) explaining that it was made a defendant due to a purely legal technicality arising from the necessity of filing suit against the individual members in order to sue the Association, that it was not charged with any act of infringement individually, that the infringing act complained about was committed by the Association and The New York Central, that the suit would

put the defendant road to no trouble or expense, and that, since it had never used the alleged infringing device, it would not be liable for damages for such use.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

By attributing "inhabitancy" to the Association of American Railroads as though it were a single person and not an agrgegate (R. 61 and 62), the decision of the Circuit Court of Appeals would take away the privilege of more than two hundred member roads under Sec. 48 of the Judicial Code not to be sued in the Southern District of New York for the alleged infringement complained of—a privilege that the District Court sustained as to five member roads—and the Cross-Respondent acquiesced (R. 59).

We read the ruling made by the Circuit Court of Appeals to be in conflict with the doctrine announced by this Court in *Puerto Rico* v. *Russell* (288 U. S. 476, 53 S. Ct. 447, 77 L. Ed. 903) after a review of the authorities on the status of groups for the purpose of federal jurisdiction; and in conflict with that doctrine as understood and applied by the Circuit Court of Appeals for the Eighth Circuit in *Sutherland* v. *The United States*, 74 F. (2d) 89.

The Long Island was sued as a representative only (R. 5, paragraph 7). It was declared innocent individually (R. 35, 36).

The decision of the Circuit Court of Appeals that The Long Island must answer for the infringement complained of in the complaint—the alleged infringement by the Association and the New York Central (R. 36)—is contrary to the stated purpose of the complaint to sue the Association

and not The Long Island, as the Cross-Respondent took great pains to explain.

For these reasons, it is respectfully submitted that this cross-petition should be granted.

ASSOCIATION OF AMERICAN RAILROADS
and
THE LONG ISLAND RAIL ROAD COMPANY.
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